account for the discrepancies between the answers to interrogatories and Lambert's evidence in the Police Court. This is not an issue which I desire to prejudge, but as at present advised I failed to see how Lambert's statement "I called them (the Police constables) from the front" and the secretary's statement "Lambert did *not* call two or any consables from the front" can be regarded, in the words of Professor Caird, as "different aspects of the same truth."

I think therefore that the order refusing these applications should be without prejudice to an application by the plaintiff to deliver further interrogatories, dealing in greater detail with the facts as sworn to by Lambert in tbe Police Court.

[14] [14] The question then arises whether Lambert can be called upon to answer such further interrogatories. Considerable argument was addressed to me as to whether Lambert was or was not an "officer" of the company within the meaning of Order XXX rule 5. I do not think it is necessary to refer to all the authorities. In the case of *Attorney-General* v. *North Metropolitan Tramways Co.*, [1892] 3 Ch. p. 70, cited North J. had no doubt that he could, if he thought fit, direct the traffic manager of the defendant company to answer an interrogatory as to the capital and moneys which had been applied for the purpose of carrying on the defendant company's business. I think the word "officer" should receive a liberal construction with a view to giving the plaintiff the information to which he is entitled. That does not mean that the Court would order a door-keeper who happened to be a witness to answer interrogatories, but Lambert was much more than that. He was at the time the acting manager in charge of the Capitol Theatre and he is still an employee of the defendants as manager of the Pavilion. In my opinion he is an "officer" of the company within the meaning of the rule and is the proper person by whom the further interrogatories should be answered.

I am much indebted to counsel on the both sides for the assistance they have given to the Court in a matter which raises various points not strictly covered by authority.

Application dismissed.

Solicitors: *Allen & Gledhill; Braddell Bros.*

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[15] [15] F.M.S. REPORTS

M. C. CORBETT v. IPOH TIN DREDGING LTD.

[O.C.J. (Howes J.) August 10, 1935]

[Perak Civil Suit No. 337 of 1934]

Contract — Conclusiveness of auditors' certificate — Meaning of phrase "when a dredge starts to work" — Conflict of laws — Remuneration by a percentage on net profits — Deduction of British Income Tax — Validity of deduction — Tin and Tin-ore (Restriction) Enactment, 1931 — Effect of grouping on contracts executed prior to the Enactment coming into force.

The plaintiff and defendants entered into an agreement on the 9th May, 1930, in respect of a tin mine known as the Ayer Itam property, clause 4 of which read as follows:

"The certificate of the Auditors of the Company as to the amount of the sum payable to Mr. Corbett and ascertainable as aforesaid shall be final and binding on both parties."

Subsequently the parties mutually varied this clause by the defendants undertaking to furnish, in addition to the certificate of the auditors, a statement of account showing the basis of the certificate.

By clause 3 of the agreement the accounts of the defendants were to be made up a year from when the dredge started work. The dredge did not begin to win tin until some weeks after it started to work and the defendants contended that the words "starts to work" mean "starts to win tin."

By clause 2(c) of the agreement the defendants agreed to pay to the plaintiff at Ipoh 15 per cent. of the net profits and by clause 5 they also agreed to pay to the plaintiff £2,000 a year, payable quarterly. Clause 5 did not specify where the £2,000 a year was to be paid, but in fact, with one exception, such payments were made in Ipoh. The defendants in making the payments under these clauses deducted amounts on account of British Income Tax in spite of protests by the plaintiff.

The defendants, without obtaining permission from the plaintiff, grouped the Ayer Itam property with other mines under the Tin and Tin-ore (Restriction) Enactment, 1931, and the plaintiff alleged that in so doing the defendants committed a breach of the agreement.

Held: that clause 4 having been mutually varied by the defendants undertaking to furnish the statements of accounts, the plaintiff could re-open such accounts or falsify and surcharge the same upon proof of errors or that the auditors had acted on a wrong principle.

Held further, that a dredge starts to work when it begins to carry out the purpose for which it is intended, namely to dredge, whether the material dredged contains tin or not.

Held further, that the law of the Federated Malay States governed the agreement and consequently the defendants were not entitled to deduct income tax payable in England.

Held further, that the defendants in grouping this property with other mines availed themselves of a lawful right given to them under the Tin and Tin-ore (Restriction) Enactment, 1931, and that in so doing they did not commit any breach of the agreement.

Roland Braddell, the Hon. Mr. E. D. Shearn and *L. T. Williams* for the plaintiff.

On the question of the certificate of the auditors under clause 4 of the agreement the plaintiff is entitled to have the accounts re-opened if he can show errors or if the auditors have misread the law and the legal construction of the agreement: *British Westinghouse and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.*, [1912] A.C. 673; *Williamson* v. *Barbour*, (1877) 9 Ch. D. 529; *Johnston* v. *Chestergate Hat Manufacturing Co. Ltd.*, [1915] 2 Ch. 338. The place of performance of the agreement is Perak and therefore the law governing it is that of the Federated Malay States: *Dicey's* Conflict of Laws, 5th Ed. pp. 628, 663, 669 and 671; *Indian and General Investment Trust Ltd.* v. *Borax Consolidated Ltd.*, [1920] 1 K.B. 539. Grouping by defendants is a breach of the agreement because the Tin and Tin-ore (Restriction) Enactment, 1931, does not affect contracts already executed.

The Hon. Mr. Palgrave Simpson and *H. R. Rix* for the defendants.

Certificate of auditors conclusive: *Sharpe* v. *San Paulo Railway Co.* (1873) 8 Ch. App. 597; *Eaglesham* v. *McMaster*, [1920] 2 K.B. 169; *In re Nott and Cardiff Corporation*, [1918] 2 K.B. 146, which contradicts the decision in *Johnston* v. *Chestergate Hat Manufacturing Co. Ltd., supra. Prima facie* the

proper law of a contract is presumed to be the *lex loci contractus* unless it is to be performed in another country: *Dicey's* Conflict of Laws, 5th Ed. p. 672; *Halsbury*, 2nd Ed., Vol. 6, p. 266. There is nothing in the agreement itself to prevent grouping.

Cur. Adv. Vult.

Howes J.: In this case the plaintiff seeks:

(1) to have an agreement dated May 9th, 1930, construed generally, so far as the same is necessary, and in particular to have clauses 2(c), 3, 4, 5 and 7 thereof construed, and for declarations as to the rights and liabilities of the plaintiff and defendants thereunder;

(2) a declaration that the defendants are not entitled to have deducted sums of money for English income tax from the amounts paid by them to the plaintiff under clause 5 of the said agreement and an order for the refund of such deductions with interest thereon at 8 per centum per annum from the date of each deduction until payment;

(3) a declaration that the defendants' action in obtaining permission to group Certificate K.L. 243 with the other certificates pleaded in paragraph 12 above, constituted a breach of the said agreement of May 9th, 1930;

(4) an account of the net profits under clause 3 of the said agreement of May 9th, 1930;

(5) a declaration from what date profits shall be ascertained;

(6) further or other relief;

(7) costs.

With regard to paragraph 21 of the plaint, in which the meaning of the words "on account" was questioned; it has now been agreed that these words in clause 5 of the agreement, mean on account of the [16] 15 per cent. of the net profits [16] to which the plaintiff was to be entitled under clause 2(c) of the agreement. This point therefore need not be considered further.

I think the best course will be to deal separately with the various points raised; and not necessarily in the order set out in the plaint.

In my view the most important is the interpretation of clause 4, as if the defendants are right in their contention, the case would be at an end.

Clause 4 reads "The certificate of the Auditors of the Company as to the amount of the sum payable to Mr. Corbett and ascertainable as aforesaid shall be final and binding on both parties."

The defendants contend that the auditors' certificate is a condition precedent to payment; and that in its absence, the plaintiff has no right to sue.

Certificates were given by the company's auditors in respect of the working of the mine up to 30th September, 1932, 31st March, 1933, and 31st March, 1934, respectively and in each certificate it was stated that no profits were payable to Mr. Corbett.

With the first of these certificates, the company's secretary, on 3rd January, 1933, wrote to Mr. Corbett's attorney in London (Mr. Brittain), enclosing "as a friendly act" a copy of the statement of accounts received from the auditors, setting out details.

In the same letter, the secretary asked whether Mr. Corbett would agree to this statement in future being made up to 31st March, so as to coincide with the company's financial year, adding:—

"If you have no objection to this course we would hand you a statement for a further six months to the 31st March next, together with our auditors' certificate, and provide you with similar documents each subsequent year up to the 31st March."

In reply Mr. Brittain wrote on 5th January, 1933:—

"I assume you would agree that Mr. Corbett is entitled to see that the expenditure charged in the account is such as is properly chargeable in accordance with clause 3 of the agreement and, subject to any comment Mr. Corbett may seek to make, I agree to the suggestion."

On 7th February, 1933, the secretary wrote:—

"Although my directors do not admit such right under the agreement dated 9th May, 1930, they are desirous of acceding, in a friendly spirit, to such request on behalf of Mr. Corbett for further details of the Ayer Itam Accounts" — a somewhat curious concession, seeing that, in their letter of 3rd January, 1933, as an inducement to agreeing to the alteration of the date of the statement, they had offered "to provide you with similar documents each subsequent year."

In other words, the company and the plaintiff mutually varied clause 4 of the agreement, by the company undertaking to furnish, in addition to the auditors' certificate, a statement of account showing the basis of the certificate.

Mr. Simpson for the defendants, in support of his contention that the certificate of the auditors is final and binding, has referred to the cases of *Sharpe* v. *San Paulo Railway Co.*, (1873) 8 Ch. App. 597 and *In re Nott and Cardiff Corporation*, [1918] 2 K.B. 146.

In the former case it was held that, in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties. In the latter, it was held that as a written order was a condition precedent to any claim by the contractor for payment of extra work, the arbitrator had no power to dispense with the performance of such condition precedent, and therefore he had no power to award any sum for extras.

Counsel for both parties have referred to the case of *Johnston* v. *Chestergate Hat Manufacturing Co. Ltd.*, [1915] 2 Ch. 338 in which a manager was to be paid a percentage on the net profits (if any) of the company, and the "net profits," were to mean the net sum available for dividends as certified by the auditors of the company after payment of all salaries and other items, which did not include certain items which would be deducted before arriving at the net profits or the income tax payable by the company. Sargant J. stated at p. 344:—

"If I can see that a certificate is given on a wrong principle, then I am not precluded by it from dealing with the matter. The object of such a certificate is to enable the auditors to deal with matters of account, and so on; and here on the face of the balance sheet and on the face of the certificate, looking at the two together, it seems to me quite clear that the auditors have proceeded upon a wrong principle . . . Even if the certificate, as an *ad hoc* certificate, is a proper certificate within the agreement, still, when it is obviously based, as I think it is, on a wrong principle, it does not oust my jurisdiction. It is not even as if this amounted to an arbitration. It is something entirely different, namely, an agreed machinery or method of arriving at a particular sum."

Mr. Simpson has also quoted the case of *Eagle-sham* v. *McMaster,* [1920] 2 K.B. 169 in which in a building contract it was provided that the architect was to be sole arbitrator or umpire between the employer and contractor in case of disputes arising during the progress of the work, or in determining the value of any variation in the work; it was held that on the construction of the contract, and having regard to the above provisions the intention of the parties was that the plaintiff should only be entitled to recover if he had a certificate of the architect, and when such certificate had not been given, the plaintiff, in the absence of misconduct or collusion on the part of the architect, could not recover. In that [17] case, however, in clause 26 of the contract it was stated that "the certificate of the architect is a condition precedent to the contractor's right of action against the employer."

As against this, Mr. Braddell, for the plaintiff, has referred to the case of *British Westinghouse and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.*, [1912] A.C. 673. He submitted that the certificate of an auditor cannot have so high an effect as the award of the arbitrator, and yet, in that case, the House of Lords, at page 686, held that where an error of law appears on the face of the award, the error can be reviewed. Mr. Braddell's contention is that by their statement of accounts, the auditors show that they have misread the law and the legal construction of the agreement, and for this reason the certificate and the accounts are open to review.

If clause 4 of the agreement stood by itself, it might be possible to hold that Mr. Simpson's contention was correct; but even then, the words "ascertainable as aforesaid" suggest that the certificate should contain particulars showing how the sum mentioned therein had been ascertained.

In view of the correspondence, I am satisfied that there has been a mutual variation of clause 4 by the undertaking by the company to furnish statements of account. Once this is established, and accounts are rendered, the plaintiff if he can show errors, or that the auditors have acted on a wrong principle, is entitled to have the accounts re-opened, or to surcharge and falsify.

This point was considered in the case of *Williamson* v. *Barbour,* (1877) 9 Ch. D. 527 and it was stated by Jessel M.R. at p. 532:—

> "If the Court is of opinion that errors of sufficient number and sufficient magnitude are shown, it is not, as I understand it, necessary that the errors shown should amount to fraud. If they are sufficient in number and importance, whether they are errors caused by mistake or caused by fraud, the Court has a right to open the accounts."

In the present case there is no suggestion of fraud; nor is it a question of an "account stated," the accounts merely having been prepared by the defendants' auditors according to their view of the agreement.

The plaintiff does not seek to have an entirely new account taken, for which his counsel contends he would be entitled to ask. He does not dispute the correctness of the auditors' actual figures; but he asks that an account be made in accordance with (what he contends are) the provisions of the agreement, based on the auditors' figures — in effect, a reorganization of the accounts.

This involves the construction of various clauses of the agreement.

The first objection raised by the plaintiff is contained in the plaint, paragraph 15(1), namely the date from which the accounts are to start. The defendants' first accounts were made up to the "year ended 30th September, 1932," instead of, in accordance with clause 3 of the agreement, a year "from the date when the dredge starts to work" which, the plaintiff says would make the date up to which the accounts are to be prepared the 3rd August, 1932.

The plaintiff fixes the 3rd August, 1931, as the day on which the dredge started to work. The defendants' engineer, Mr. Fulton, cabled to them on the 28th July, 1931, "Dredge started operating 27th July. Everything very satisfactory."

The defendants seek to read the words "starts to work" as starts to win tin, but have called no evidence to show that the expression has any special meaning amongst miners or persons accustomed to dredging.

The plaintiff's witness, Mr. Whittaker, stated: "What dredging people would understand is, after the trial run and the buckets start digging dirt, then the dredge 'starts to work'." He did not agree that a dredge does not "start to work" until it begins to win tin. He added: "The dredge goes on to revenue account as soon as it is taken over from the contractor, after the trial, provided the run is successful."

I do not admit that the words used, call for any explanation by oral evidence as to what they mean. Obviously, a dredge "starts to work" when it begins to carry out the purpose for which it is intended, viz. to dredge, whether the material dredged contains tin or not.

If the parties had intended the date from which the accounts were to run to be "from the date when the dredge wins tin" (or words to that effect) they would have said so. Such words might have called for extrinsic evidence as to that meaning; but the actual words used are plain and unequivocal, and must therefore be construed according to their ordinary meaning.

I therefore hold that the expenditure and accounts mentioned in clause 3 of the agreement, must date from 3rd August, 1931, and not from 30th September, 1931.

I will now deal with prayer (2) of the plaint which asks for a declaration that defendants are not entitled to deduct sums of money for English Income Tax, and for the amounts deducted to be refunded to the plaintiff with interest.

It is admitted that the defendant company is incorporated in England, although it is also registered under British and Foreign Companies Enactment, 1912, in the Federated Malay States.

This question arises under clause 5 of the agreement, by which for a period of three years from the date on which the dredge was purchased, Mr. Corbett is entitled to receive, on account of the 15 per cent. of the net profits due to him under clause 2(c) of the agreement, £2,000 a year, payable quarterly.

The defendants rely on the provisions of the Imperial Income Tax Act, 1918, and particularly rule 19 of the General Rules applicable to Schedules A, [18] B, C. D and E made thereunder, [18] and contained in the first Schedule to the Act, (Statutes 1918, p. 310).

Rule 19 provides that in a case like the present, the company is entitled, on making the payment, to deduct and retain thereout a sum representing the amount of tax; and further, that the payee (Mr. Corbett) is to allow the deduction of tax upon receipt of the residue of the payment, and the company is acquitted and discharged to the extent of the deduction as if that sum had been actually paid.

Mr. Braddell complains that there is no evidence to shew that the company have paid the amount of income tax which they had deducted; nor have they given Mr. Corbett any certificate of such deduction. I can find no obligation for them to do so. If the defendants are right in their contentions, this point seems to me immaterial.

The first question to decide is, what law governs the agreement? That of England or that of the Federated Malay States? No mention of this is made in the agreement; so that the intention of the parties must be considered.

Prima facie the proper law of a contract is presumed to be the *lex loci contractus,* but this depends on the character of the contract and the nature of the transaction; and generally speaking, the law of the place with which the contract has the most real connection will be regarded as the law governing the contract.

The law is stated in *Dicey's* Conflict of Laws, 5th Ed., p. 663, as follows:—

"The interpretation of a contract and the effect, i.e. the rights and obligations under it of the parties thereto, are to be determined in accordance with the proper law of the contract,"

and at page 672 it is stated:—

"Second presumption — When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance may be presumed to be the law of the country where the performance is to take place *(lex loci solutionis)."*

This statement of the law was considered and approved by the Privy Council in the case of *Benaim & Co.* v. *L. S. Debono,* [1924] A.C. 514, 520.

What is there in this agreement to be performed, and where? On the part of the defendants, their obligation is merely to pay money. Under clause 2(a) and (b) they agree to remit to Ipoh the dollar equivalent of £12,833 and £7,167 respectively. Under clause 2(c) the 15 per cent. of the net profits is to be paid at Ipoh. Whilst clause 5 does not specify that the quarterly payments amounting to £2,000 a year are to be paid in Ipoh this was in fact (with one exception) done, and was the obvious intention of the parties.

On the part of Mr. Corbett, it is clear that the performance of the contract, (viz. the acts necessary to vest the leases in the company) could only be done in the Federated Malay States. Under this agreement, nothing whatever had to be done in London, the *locus contractus.*

It therefore follows that the proper law of the contract is that of the Federated Malay States.

Under clause 5 of the agreement the defendants are bound to pay Mr. Corbett £2,000 a year. They have failed to do so.

As stated by Sankey J., in the case of *Indian and General Investment Trust Ltd.* v. *Borax Consolidated Ltd.,* [1920] 1 K.B. 539, 548:—

"Now it may be stated as a general proposition of English law that an agreement by A. to pay B. a certain sum is not discharged by the payment to B. of a sum of less amount and the payment to C. of the balance, unless (1) this position is created by statute or common law, or (2) by stipulation express or implied between the parties."

This case was considered and followed, in the case of *London and South American Investment Trust Ltd.* v. *British Tobacco Co., (Australia) Ltd.,* [1927] 1 Ch. 107.

The defendants in the present case are seeking to do exactly what Sankey J., *supra,* said they could not. Since I hold that the proper law of this contract is that of the Federated Malay States; so far as I am concerned, England is a foreign state and it is not lawful under the law of the Federated Malay States to deduct any tax payable to a foreign state, nor will such a deduction amount to a partial discharge of the contract.

Under English law, in view of rule 19, *supra,* the defendants would be within their rights, in making the deduction. Under Federated Malay States law they are not.

It is agreed that up to the filing of the plaint the defendants have deducted for income tax the sum of £375, and since I hold that the deduction was unlawful, I give judgment for the plaintiff on prayer (2) of the plaint, and hold that the defendants were not, and are not entitled to deduct English income tax in respect of the £2,000 a year.

On this portion of the claim, I give judgment for the plaintiff for the dollar equivalent of £375 and interest thereon at the rate of 8% per annum until payment.

The next question, is, what has been called throughout the case, the "writing-off question" and arises out of the construction of clause 3 of this agreement.

That clause provides the means of ascertaining the 15 per cent. of the net profits to be paid to Mr. Corbett under clause 2(c).

Clause 3 sets out certain items of expenditure, namely:—

(a) The £20,000 paid to Mr. Corbett in respect of the mining lease.

[19] [19] (b) The purchase price of the dredge and other things, paid to the receiver of the company from whom it was acquired.

(c) The total cost of dismantling, transport and re-erection of the said dredge on the said properties, i.e. on the Ayer Itam mine.

(d) All outgoings whatsoever incurred in working the said properties and disposal of the tin obtained therefrom.

Then follow these words:

"The expenditure comprised in (a), (b) and (c) shall be written off as to two-fifths thereof in the first year as to two-fifths thereof in the second year and as to the remaining one-fifth thereof in the first six months of the third year from the date when the dredge starts to work."

Owing to the agreed variation in the dates for making up the accounts, the order of the proportional writing-off is now two-fifths, one-fifth and two-fifths; for the year, half-year and following year, respectively.

Chartered accountants have been called by both parties to explain the meaning of "writing-off," but from the context the expression is not used in its ordinary sense, as the agreement says the writing off shall be at definite periods and in stated proportions.

It provides for three separate accounting periods which will result in the whole of the capital expenditure being written off (so far as Mr. Corbett is concerned) in 2½ years.

The intention of the parties seems perfectly clear to me. The first three items (a), (b) and (c) are undoubtedly what is ordinarily known as capital expenditure, and are affixed or ascertainable amount. The total of these is, (to use a colloquialism) to be "washed out" during the first 2½ years.

Assuming, (for the sake of simplicity) that the total of (a), (b) and (c) come to £50,000. At the end of the first year, two-fifths of this sum, or £20,000 is to be written off. This £20,000 would be added to the expenditure included in (a). "All outgoings &c.," which is clearly intended to include the expenses incurred in running the mine and disposing of the tin, (which in mining accountancy would come ordinarily under the heading of "revenue-expenditure" and "general expenditure"), and the total would be deducted from the gross receipts derived from working the mine.

If these gross receipts were, at the end of the first year, less than the £20,000 + (d), nothing would be payable that year to Mr. Corbett. If the gross receipts were greater, he is entitled to 15 per cent. of the balance.

At the end of the next six months, one-fifth or £10,000 would be added to (d) (the total revenue and general expenditure for those six months) and deducted from the gross receipts for that period, and, similarly, provided the latter exceeded £10,000 + (d) Mr. Corbett would be entitled to 15 per cent. of the balance.

At the end of the next year, two-fifths or £20,000 would again be added to (d) (the total expenditure for that year) and deducted from the gross receipts for that period. Again, provided the latter exceeded the £20,000 + (d), Mr. Corbett would be entitled to 15 per cent. of the balance.

Thenceforth, since the whole of the £50,000 capital expenditure mentioned in (a), (b) and (c) has been "washed out" the only deduction from the gross receipts, would be the expenditure in working the mine and disposing of the tin under (d), and Mr. Corbett would be entitled to 15 per cent. of the balance.

For the defendants, Mr. Simpson has argued that there is nothing in clause 3 to say that a loss shall not be carried forward, and to say that any of these expenses which cannot be written off in the first or second year should be cancelled, is something outside the agreement. The defendants' witness, Mr. Scott, went so far as to suggest that as no mention was made of the profits being for any particular year, he would read clause (2)(c) as meaning the profits over the life of the leases, there being nothing in the agreement to suggest that there should be annual profits.

In my opinion, such contentions are entirely contrary to the whole spirit of the contract and would render the provisions as to writing-off of proportionate amounts and over specified periods, nugatory. As I read the writing-off clause it was inserted for the benefit of Mr. Corbett, and for this reason, the accounts had to be prepared in such a form as to show three definite cuts at the end of each period mentioned in the agreement. To suggest that the agreement did not contemplate annual accounts or annual gross profits, seems to me absurd and contrary to common sense. In dealing with a public company, anyone would understand that its accounts would be prepared annually for purpose of its balance-sheet.

In preparing the accounts, the company's auditors, instead of writing off the capital expenditure in 2½ years according to the agreement, have, in the three statements supplied, brought forward debit balances remaining to be written off, the amount in the last, to 31st March, 1934, being £9,452.17.11.

In their account for the year ending 30th September, 1932, the auditors have written off sums entirely different to those provided for in the agreement. According to the auditors' figures, the gross capital expenditure was £80,855.10.4. Two-fifths of this amount would be £32,342.4.2, and instead, they have written off the amount of the profit, viz. £15,394.13.10. [20] The net result on that account was that they [20] carried forward £65,460.16.6, remaining to be written off.

In the next account, to 31st March, 1933, the amount written-off is £21,413.3.7; again, the amount of the profit, instead of the one-fifth. They have adopted the same procedure in the account to 31st March, 1934, and have written off the profit of £34,594.15.0.

All these accounts appear to me to have been prepared in direct opposition to the terms of the agreement; and can only have been done owing to some misunderstanding, by the auditors, of the contract.

I will now deal with the allocation of certain expenditure in the accounts, to which objection has been taken by the plaintiff in paragraph 15 of the plaint.

In the first account is an item "Cost of dismantling transport and re-erection of dredge £25,782.9.4" of which sum the plaitiff claims particulars. The defendants deny that he is entitled to such particulars. This item is covered by clause 3(c) of the agreement, and is one of those included in the writing-off question.

Particulars of the £25,782.9.4 have not been produced, but the defendants admit that it included some £6,000 expended on improving the dredge. The pontoon was lengthened by 16′ 0″, and six extra "jigs" were provided and the cost of excavation to float the dredge was included. Mr. Corbett when recalled and further cross-examined stated:—

"It was recognised by me and the company that the dredge would require alterations to make it suitable for working the Ayer Itam mine.....They decided to increase the number of jigs. This was known before the agreement was made."

It therefore becomes a question, what was the intention of the parties, and what was in their minds, when clause 3(c) was made.

To have set out in detail, all the points which were evidently discussed, would have involved a lengthy clause; in fact, a specification in miniature.

It is most unlikely that a dredge could be dismantled and re-erected without the use of some new materials; a dredge cannot be refloated without excavating a "paddock" containing water.

It is admitted that the improvements were in the contemplation of the parties.

On behalf of the plaintiff it is contended that these, and the cost of excavation, new sand pumps &c. should be charged to capital expenditure, and since these are items of expenditure not included in clause 3, they should not be brought to account in arriving at the figure to be written-off.

It was admitted by the defendants' witness, Mr. Scott, that clause 3(a), (b) and (c) did not include all items of capital expenditure in connection with the mine, but only those three classes of capital expenditure, out of a possible larger number.

I am endeavouring to interpret what was the intention of the parties; and in my view, the commonsense and legal interpretation of clause (c) is that it was to include everything in connection with the dismantling, transport and re-erection of the "said dredge." It was a particular dredge; and before making the agreement, the parties had in mind what would be necessary, not only to transport and re-erect it, but also the improvements and renewals required, to render the dredge suitable for the purpose for which it had been acquired. The drafting of the clause leaves much to be desired, but I think this must have been what the parties intended.

I therefore hold that the improvements and excavation for floating the dredge, were properly chargeable to clause 3(c). As to the sand pump, I have no evidence; but presumably it included the alterations considered necessary.

The next item to which objection is taken in the first account in the plaint, paragraph 15(iv), is a debit of £4,350.7.8 for "sundry expenditure in bungalows, light railway, roads and plant and machinery" which has been deducted as "Outgoings incurred in working the said properties and disposal of the tin obtained therefrom under clause 3(d)."

The plaintiff contends that these items are not chargeable against him under clause 3(d), but are general capital expenditure, and do not come within those items of capital expenditure enumerated in clause 3.

It appears that the light railway was put down originally for the transport of the dredge, but is now being used for conveying firewood and materials to the dredge, and the excavated tin ore from the dredge.

I admit that this light railway presents some difficulty; as in view of its original purpose it might have been charged to clause 3(c) as part of the cost of transporting the dredge. On the other hand, there is no evidence to show that a light railway was essential, but probably it was found to be the most economical method. But in view of the fact that it is now being utilised (and doubtless this was in the contemplation of the company when they laid it down) for the purpose of serving the dredge, it is impossible to disassociate it from capital expenditure. According to Mr. Whittaker, such an item should be charged to "surface equipment account."

The road is a siding originally made for bringing the component parts of the dredge (which were brought in lorries) from the Government road, on to the site, before putting them on to the light railway. The road is now used for access to and from the starting point of the light railway, and also to the bungalows in question.

[21] There has been no evidence as to what was included in "plant and machinery", but as regards the light railway, the roads and bungalows, I have no hesitation in holding that these are not "outgoings" within clause 3(d), but are capital expenditure although not of the classes included in clause 3(a), (b) and (c), and consequently were not chargeable against the plaintiff for purposes of writing-off. [21]

Mr. Simpson for the defendants has argued that the word "outgoings" in the expression "All outgoings whatsoever incurred in working the said properties and the disposal of the tin obtained therefrom" includes any expenses incurred to enable the working of the mine to proceed and not only costs incurred after the mine starts working.

He referred to *Halsbury's* Laws of England, Vol. Vol. 25, p. 335, paargraph 563, wherein it is stated:

"The term 'outgoings' is of very wide import, and includes not merely rates, taxes, repairs, and the ordinary expenses of cultivating or managing the property, but also expenses, though of a capital nature, of works executed by local authorities under their sanitary and other powers which are recoverable from the owner, and are also, in general, charged on the property."

With this proposition, as between vendor and purchaser, or between landlord and tenant, I agree; it being well established law. But I am endeavouring to construe an agreement between business people, and not a conveyance or lease.

Mr. Simpson also quoted the judgment of Lindley L.J. in the case of *In re Bennett, Jones* v. *Bennett*, [1896] 1 Ch. 778, 784 wherein he stated outgoings meant "some payment which must be made in order to secure the income of the property." That, however, was a case concerning the liability of a tenant for life for expenses of insuring the settled premises and the expenses of a yearly audit and stock-taking, where capital was left in a business.

Finally, Mr. Simpson suggested that clause 3(d) was an omnibus clause which would include expenses of any nature.

The defendants' witness, Mr. Scott, speaking as an accountant, said in examination-in-chief, the words "outgoings whatsoever" include capital expenditure; "it would include light railway buildings and roads"; but, very frankly, in cross-examination said this item of £4,350.7.8 would not be revenue expenditure but would be capital expenditure, adding "It (clause 3(d)) is a general clause to cover any expenditure not included in the previous clauses."

In my opinion, the meaning of clause 3 of the agreement is clear. The first three items (a), (b) and (c) were all in the nature of capital expenditure of a known or ascertainable nature at the time the agreement was made.

Clause 3(d) means ordinary current expenses, which, in mining accounts are usually allocated either to general or revenue expenditure incurred in working the mine.

The expenditure in (a), (b) and (c) was to be written-off in 2½ years. The expenditure under (d) was to be deducted from the gross receipts annually throughout the contract.

I attach no particular import to the word "outgoings" in clause 3(d). Mr. Scott said that if "expenses" had been substituted, his interpretation of the clause, as an accountant, would have been the same.

It will be noted that the words "outgoings whatsoever" are qualified, by the words which follow "incurred in working the said properties."

The question is, what this expression means in a contract of this nature between a mining company and a mining engineer?

I accept the evidence of the plaintiff's witness, Mr. Clarke, as to how this expression would be understood in the mining world, viz:

> "The expression would generally be understood to mean, current expenditure incurred in recovering or endeavouring to recover tin from the ground, and necessary treatment, until the tin ore is ready to send to the smelters."

Mr. Clarke was not cross-examined as to this statement.

If the defendants' contention is that clause 3(d) is to include capital expenditure, it is difficult to see why the expenditure in 3(a), (b) and (c) should have been dealt with separately, in the last paragraph of clause 3, as regards the writing-off.

I therefore hold that the company's auditors have misread the contract; and that all three statements of account must be adjusted on the above lines, not only as to the deductions made for the items of £4,350.7.8 and £196.0.0 in the first and second accounts respectively, but also as to the amounts wrongly written-off (to which I have already referred), viz. the amounts of profit, instead of two-fifths, one-fifth and two-fifths respectively in accordance with clause 3 of the agreement.

The next point to consider is paragraph 20 of the plaint which concerns clause 7 of the agreement, the meaning of which clause the plaintiff states is not free from doubt. He asks for a general monthly statement of account, and under prayer (1) of the plaint asks that clause 7, *inter alia,* may be construed.

In paragraph 26 of the amended defence, the defendants say that they have, by the payments of £2,000 a year (under clause 5), already advanced to the plaintiff, more than he is entitled to under clause 7.

Mr. Simpson, however, admits that the plaintiff is entitled to information each month as to the amount which the company consider it reasonable for the plaintiff to draw, in respect of the 15 per cent. of the profits. Mr. Braddell, for the plaintiff, stated that provided Mr. Corbett is given a monthly statement of how the profits of the mine are runnning, that is all he wants.

I confess clause 7 is not altogether clear to me. I take it to mean, that once the writing-off period of the capital expenditure in clause 3(a), (b) and (c) is completed, and Mr. Corbett is [22] entitled to his [22] 15 per cent. of the net profits, there shall be paid monthly to him, such sum as the company consider reasonable on account of his 15 per cent; the balance remaining due to Mr. Corbett would presumably be ascertained and paid at the end of each year. Apparently, this clause only comes into operation after the £2,000 a year mentioned in clause 5 has ceased to be payable.

I do not consider that Mr. Corbett is entitled to ask for general monthly statement of account. Up to the present time, owing to the differences between the parties, there has been no payment under clause 7, but when this is made, I assume the company will naturally supply him with some kind of statement as to the amount of the months net profit, in respect of which the payment on account of the 15 per cent. is made. At the end of each financial year Mr. Corbett will be furnished with the annual statement of accounts, as previously agreed.

I will now deal with the question of grouping of the mines, particulars of which are set out in paragraph 12 of the plaint.

In prayer (3) the plaintiff asks for a declaration that the defendants' action in obtaining permission to group Certificate K.L. 243 with the other certificates pleaded in paragraph 12, constituted a breach of the agreement of May 9th, 1930.

The defendants in paragraph 6 of their amended defence admit they obtained permission to group the certificate of production mentioned.

The right to group certificates of production arose under the Tin and Tin-ore (Restriction) Enactment, 1931, which was passed subsequently to the agreement, and was therefore never in the contemplation of the parties when the agreement was made. It is therefore difficult to see how it can be alleged to have been done in breach of the said agreement.

The object of the Enactment was to restrict the output of tin mines in the Federated Malay States.

Shortly, the scheme is that each mine obtains an assessment based on its output during the years

1929-1930; or in the case of new mines, on an estimate based on borings. Capital expenditure on new equipment is, in certain cases, taken into account in fixing the assessment. Each mine is allowed to produce and export a certain percentage of the assessment; the percentage varying from time to time by public notification, and may be between 25 per cent. and 40 per cent. The amount allowed to be produced and exported is called the "quota", and a "certificate of production" is given to each mine, showing this quota for each quota period.

Provision is made for "grouping" mines, whether in the same ownership or belonging to different people. Unless a mine is grouped, it may not have in stock tin-ore in excess of a certain proportion of the quota; e.g. if the quota for three months were 3,000 pikuls; at the beginning of the next quota period, the mine may carry over 2,000 pikuls from the last quota.

Grouping assists mine-owners by allowing them to have, collectively, both more tin-ore in stock and also to produce and export more tin-ore from one selected locality than they could individually, i.e. ungrouped. It entitles the grouped owners to produce the quantity allowed by the quota for the whole group, out of one or more selected mines only. "Quotas" are saleable, (the price varying according to the market); with the consent of the Controller of Tin Restriction.

In the present case, the defendants own another mine at Lahat; and without consulting Mr. Corbett, grouped the Ayer Itam property (the subject matter of the contract) with their mine at Lahat, together with two other mines owned respectively by Sungei Kinta Tin Dredging Ltd., and the Temoh Tin Dredging Ltd.

In paragraph 6 of the defence, the defendants denied that permission to group was obtained without the knowledge and consent of the plaintiff, and alleged that he had requested that the application to group their certificates of production should be made.

Mr. Simpson has, however, since agreed that there was a misunderstanding, and that the defendants' manager, Mr. Fulton, was under a misapprehension as to this, and Mr. Simpson admits that the consent of the plaintiff to the grouping was never obtained. In fact, there is ample evidence in the correspondence that throughout, his attorney and Mr. Corbett strongly protested against the grouping.

The defenadnts claim that grouping was a proper and reasonable arrangement in the interests of all concerned.

Mr. Corbett, on the other hand, complains that owing to the grouping and the purchase of quotas the defendants have raised a considerable quantity of ore from the Ayer Itam property, and during the 2½ years, on the amount of ore produced from the Ayer Itam (owing to quotas purchased from the associated companies) the defendants have made a profit of £71,000. But for the additional quotas, there would have been a loss on Ayer Itam. Mr. Corbett stated:—

"In doing this they raised 8,792 pikuls of ore which would otherwise still be in the ground at Ayer Itam: and if they had not had the quota, they could not have done so, and it (the ore) would be there for me to share in, when we reached the 15 per cent. (of the) profits after the 2½ years. At the end of 2½ years the capital expenditure of £80,855.10.4 has to be written off in the three periods. After the 2½ years I go on to the 15 per cent. profits, without any deduction, and the 8,792 pikuls would still be in the ground. Since the expiration of 2½ years, the defendants have bought little or no quota. The amount of ore raised since then is the equivalent of the Ayer Itam quota allowances only. There is nothing to prevent the defendants closing [23] down Ayer Itam and using the quota on some other mine in which I am not interested. That is what I am afraid of. The 8,792 pikuls taken from Ayer Itam leaves the same amount in the other companies' mines unused." [23]

I think Mr. Corbett's evidence explains very clearly his attitude in the matter, which, in the main, is that the defendants obtained permission to group without his knowledge or consent.

The attitude of the defendants, as regards grouping, is expressed in paragraphs 7, 8 and 9 of the defence.

Firstly, they say that it is a question of management of the mine, which is one for their discretion; secondly, that the plaintiff appealed to the Controller against the grouping and obtained an order cancelling permission to group or alternatively a refusal of permission to group during the then next quota period, but on appeal by the defendants to the Central Committee, the decision was reversed. They contend that by rule 10(2) of the Rules, published on the 30th December, 1932, under the Tin and Tin-ore (Restriction) Enactment, 1931, the decision of the Committee is final and without appeal. Further, they say that under section 4 of the Enactment, this Court has no jurisdiction to adjudicate on the plaintiff's claim, so far as it concerns grouping or other matters within the Enactment.

This matter is further complicated by the existence of what is called the "Buffer Pool" a statutory agreement by which stocks of tin are held in London pending release and sale. The first account shows that there are 896.49 pikuls of tin standing to the credit of the defendants in the Buffer Pool; tin which was raised from Ayer Itam, but partly credited to defendants' other property at Lahat.

Mr. Corbett complains (1) that with tin raised from Ayer Itam, the Lahat property of the defendants become a share-holder in the Buffer Pool; (2) that the cost of raising that tin (with the dredge in question) was charged against him; (3) that in respect of this tin, the defendants have departed from their contract to pay him 15 per cent. of the net profits; and (4) that Lahat tin remains in the Pool to the credit of Lahat, to abide by what is really a gamble.

Mr. Corbett further complains that Ayer Itam tin is in London, awaiting the result of a gamble, and that the defendants had no right to enter into their gamble without his consent. He asks the Court to say that the defendants cannot raise Buffer Stock out of Ayer Itam, and to order an inquiry as to what damages he has suffered by reason of the grouping under prayers (3) and (6) of the plaint.

I admit that this grouping question raises many difficulties. The first is whether the defendants' action in obtaining grouping certificates can be held to be a breach of the agreement.

As a preliminary, there was in the agreement no undertaking by the defendants to work the Ayer Itam mine. When tin restriction came into force, had the circumstances been different, the defendants might have closed down Ayer Itam, and raised their quota allowance of tin-ore from their own properties. What remedy would Mr. Corbett have had in such event? As far as I can see, none. Had the defendants not grouped, but had worked Ayer Itam as an individual mine, they would have been restricted to the production allowed by the Ayer Itam quota for the time being. I fully appreciate Mr. Corbett's point of view. In effect he says:—

"That would not have mattered to me, as whatever were the profits or loss, at the end of the 2½ years, the capital expenditure would have been written off, and thereafter I should have had 15 per cent. of the profits, and there would be 8,792 more pikuls of ore remaining in the Ayer Itam property than there is to-day, on which I should get my 15 per cent. of the net profits."

Can it be said that the result of the Tin Restriction Enactment was to affect the agreement to such an extent as to render it impossible of performance? I do not think so. Apart from the grouping question, the only effect of the Enactment would have been that, by reason of restriction, the profits on Ayer Itam might have been less.

When the Enactment came into force, the only portion of the contract remaining to be performed, was the payment by the company to Mr. Corbett of 15 per cent. of the net profits. Neither party is asking for the contract to be set aside; Mr. Corbett is, on the contrary, strongly endeavouring to support it, maintaining that the defendants' action in grouping was a breach of contract.

I am satisfied that the defendants committed no breach of the agreement by their action in obtaining permission to group. Nor is the plaintiff entitled to any relief in equity, in respect of the grouping.

The plaintiff does not claim in tort; but relies on a breach of contract.

The action of the defendants in grouping may have caused loss to the plaintiff; but there are many cases of *damnum absque injuria*. There has been no invasion of the plaintiff's rights. All that the defendants did was to avail themselves of a lawful right given to them by Enactment. This they did, as was their duty, in the interest of their share-holders. I can find no ground for the suggestion that Mr. Corbett was entitled to be consulted before the defendants exercised this right.

I therefore hold that the declaration sought in prayer (3) of the plaint, must be refused.

[24] [24] To summarise: I hold:—

1. That on the proper construction of the agreement, (as I have already indicated) the "writing-off" of the expenditure mentioned in clause 3(a), (b) and (c) must be done in three definite cuts, and in the proportions mentioned (but as varied by consent); namely as to the two-fifths at the end of the first year; one-fifth for the next six months, and two-fifths at the end of the next year, from the date when the dredge started to work, viz. from 3rd August, 1931, so that at the end of 2½ years from 3rd August, 1931, the accounts between the plaintiff and the defendants shall be clear of the capital expenditure specified in clause 3(a), (b) and (c).

2. That thereafter, the plaintiff shall be entitled to 15 per cent. of the net profits derived by the company from working the properties in question, the net profits being ascertained by deducting from the gross receipts, the expenditure incurred in working the said properties, and disposal of the tin obtained therefrom as provided in clause 3(d). The accounts to be made up on this basis to the 31st March in each year.

3. I hold that under clause 4 of the agreement (as now varied by mutual consent) the defendants must furnish the plaintiff with statements of account at the end of each financial year, and in particular, order that they supply a statement to 31st March, 1935, which, so far, the defendants have failed to do, although requested.

4. With regard to the construction of clause 5 of the agreement; it has (as I have already stated) been agreed by counsel for the parties that "on account" means on account of the 15 per cent. of the net profits.

5. With regard to clause 7 of the agreement, as already indicated, I order the defendants to furnish the plaintiff with a statement each month showing the amount of profits that are being earned.

6. As I have already held, the defendants were not entitled to deduct English Income Tax from the amounts payable to the plaintiff under clause 5 of the agreement, and the plaintiff is entitled to judgment for the dollar equivalent of £375 and interest at 8 per cent. per annum until payment in respect of prayer (2) of the plaint. It follows that in future, the plaintiff is entitled to the 15 per cent. of the net profits without deduction of English Income Tax.

7. I refuse the declaration sought in prayer (3) of the plaint, as regards grouping.

8. As regards prayers (4) and (5) of the plaint which ask for an account of the net profits under clause (3) of the agreement, it is obvious that the statements of account will have to be entirely reorganised on the basis indicated in (1) of this summary which will show the net profits on which the plaintiff is entitled to 15 per cent. I order that these statements of account be furnished by the defendants, and that the date from which the profits are to be ascertained shall be from 3rd August, 1931, but made up to the 31st March in each year.

9. Costs. Although, in the main, the plaintiff has succeeded throughout his claim; he has failed on two points, viz. on the question of grouping and in the matter of the expenditure on the dredge. I therefore reserve the question of costs for further argument.

20th August, 1935: — By a joint letter dated 16th August, 1935, Messrs. L. T. Williams and H. Rodway Rix, solicitors for the plaintiff and defendants respectively have intimated that they are prepared to accept my suggested proportionate division of the costs.

I therefore order that the defendants do pay the plaintiff seven-eighth (7/8) of the taxed costs.

Costs to be on the higher scale, and I certify for two counsels on both sides.

A. G. DOBB v. PUBLIC PROSECUTOR

[A. Cr. J. (Mudie J.) September 12, 1934]

[Seremban Magistrate's Criminal Appeal No. 17 of 1934]

Motor car — Vehicle licensed outside the F.M.S. — Exemption from being licensed in the F.M.S. — Motor Vehicles Enactment, No. 3 of 1928, ss.5, 13, 44(i).

Section 5(i) of the Motor Vehicles Enactment No. 3 of 1928 which requires every motor vehicle or carriage used to be licensed under the Enactment does not apply to any vehicle registered or licensed under any law relating to motor vehicles or carriages in the Colony so long as such registration remains in force.